

# ALTERNATIVE OUTCOMES

Possible alternative outcomes in removal proceedings (not a removal order or approval of application for relief). This chapter includes:

1. voluntary departure; administrative closure; prosecutorial discretion

- Voluntary Departure

# Voluntary Departure

**WARNING:** Overstaying a voluntary departure period brings severe, unwaivable consequences.

See [Practice Advisory on Voluntary Departure](#).

## 8 CFR § 1240.26 - Voluntary Departure

**§ 1240.26 Voluntary  
departure—authority of  
the Executive Office for  
Immigration Review.**

## **(a) General Eligibility**

**(a) Eligibility: general.** A [noncitizen](#) previously granted voluntary departure under section 240B of the [Act](#), including by [DHS](#) under [§ 240.25](#), and who fails to depart voluntarily within the time specified, shall thereafter be ineligible, for a period of ten years, for voluntary departure or for relief under sections 240A, 245, 248, and 249 of the [Act](#).

## **(b) Prior to completion of removal proceedings**

**(b) Prior to completion of removal proceedings—(1) Grant by the immigration judge.**

**(i)** A [noncitizen](#) may be granted voluntary departure by an [immigration judge](#) pursuant to section 240B(a) of the [Act](#) only if the noncitizen:

**(A)** Makes such request prior to or at the master calendar hearing at which the case is initially calendared for a merits hearing;

**(B)** Makes no additional requests for relief (or if such requests have been made, such requests are withdrawn prior to any grant of voluntary departure pursuant to this section);

**(C)** Concedes removability;

**(D)** Waives appeal of all issues; and

**(E)** Has not been convicted of a crime described in section 101(a)(43) of the [Act](#) and is not deportable under section 237(a)(4).

**(ii)** The judge may not grant voluntary departure under section 240B(a) of the [Act](#) beyond 30 [days](#) after the master calendar hearing at which the case is initially calendared for a merits hearing, except pursuant to a stipulation

under [paragraph \(b\)\(2\)](#) of this section.

**(2) *Stipulation.*** At any time prior to the completion of removal proceedings, the [DHS](#) counsel may stipulate to a grant of voluntary departure under section 240B(a) of the [Act](#).

**(3) *Conditions.***

**(i)** The judge may impose such conditions as he or she deems necessary to ensure the [noncitizen](#)'s timely departure from the United States, including the posting of a voluntary departure bond to be canceled upon proof that the [noncitizen](#) has departed the United States within the time specified. The alien shall be required to present to [DHS](#), for inspection and photocopying, the [noncitizen](#)'s passport or other travel documentation sufficient to assure lawful entry into the country to which the [noncitizen](#) is departing, unless:

**(A)** A travel document is not necessary to return to the [noncitizen](#)'s native country or to which country the [noncitizen](#) is departing; or

**(B)** The document is already in the possession of [DHS](#).

**(ii)** [DHS](#) may hold the passport or documentation for sufficient time to investigate its authenticity. If such documentation is not immediately available to the [noncitizen](#), but the [immigration judge](#) is satisfied that the [noncitizen](#) is making diligent efforts to secure it, voluntary departure may be granted for a period not to exceed 120 [days](#), subject to the condition that the [noncitizen](#) within 60 [days](#) must secure such documentation and present it to [DHS](#). [DHS](#) in its discretion may extend the period within which the [noncitizen](#) must provide such documentation. If the documentation is not presented within the 60-day period or any extension thereof, the voluntary departure order shall vacate automatically and the alternate order of removal will take effect, as if in effect on the date of issuance of the

[immigration judge](#) order.

(iii) If the [noncitizen](#) files a post-decision motion to reopen or reconsider during the period allowed for voluntary departure, the grant of voluntary departure shall be terminated automatically, and the alternate order of removal will take effect immediately. The penalties for failure to depart voluntarily under section 240B(d) of the [Act](#) shall not apply if the [noncitizen](#) has filed a post-decision motion to reopen or reconsider during the period allowed for voluntary departure. Upon the granting of voluntary departure, the [immigration judge](#) shall advise the [noncitizen](#) of the provisions of this paragraph (b)(3)(iii).

(iv) The automatic termination of a grant of voluntary departure and the effectiveness of the alternative order of removal shall not affect, in any way, the date that the order of the [immigration judge](#) or the [Board](#) became administratively final, as determined under the provisions of the applicable regulations in this chapter.

## **(c) At the conclusion of the removal proceedings**

**(c)** *At the conclusion of the removal proceedings—(1) Required findings.* An [immigration judge](#) may grant voluntary departure at the conclusion of the removal proceedings under section 240B(b) of the [Act](#), if he or she finds that:

(i) The alien has been physically present in the United States for period of at least one year preceding the date the Notice to Appear was served under section 239(a) of the [Act](#);

(ii) The alien is, and has been, a person of good moral character for at least five years immediately preceding the application;

(iii) The alien has not been convicted of a crime described in section 101(a)(43) of the [Act](#) and is not deportable under section 237(a)(4); and

(iv) The alien has established by clear and convincing evidence that the [noncitizen](#) has the means to depart the United States and has the intention to do so.

(2) *Travel documentation.* Except as otherwise provided in [paragraph \(b\)\(3\)](#) of this section, the clear and convincing evidence of the means to depart shall include in all cases presentation by the [noncitizen](#) of a passport or other travel documentation sufficient to assure lawful entry into the country to which the [noncitizen](#) is departing. [DHS](#) shall have full opportunity to inspect and photocopy the documentation, and to challenge its authenticity or sufficiency before voluntary departure is granted.

(3) *Conditions.* The [immigration judge](#) may impose such conditions as he or she deems necessary to ensure the [noncitizen](#)'s timely departure from the United States. The [immigration judge](#) shall advise the [noncitizen](#) of the conditions set forth in this paragraph (c)(3)(i)-(iii). If the [immigration judge](#) imposes conditions beyond those specifically enumerated below, the [immigration judge](#) shall advise the [noncitizen](#) of such conditions before granting voluntary departure. Upon the conditions being set forth, the [noncitizen](#) shall be provided the opportunity to accept the grant of voluntary departure or decline voluntary departure if he or she is unwilling to accept the amount of the bond or other conditions. In all cases under section 240B(b) of the Act:

(i) The alien shall be required to post a voluntary departure bond, in an amount necessary to ensure that the [noncitizen](#) departs within the time specified, but in no case less than \$500. Before granting voluntary departure, the [immigration judge](#) shall advise the [noncitizen](#) of the specific

amount of the bond to be set and the duty to post the bond with the ICE Field Office [Director](#) within 5 business [days](#) of the [immigration judge](#)'s order granting voluntary departure.

(ii) A [noncitizen](#) who has been granted voluntary departure shall, within 30 [days](#) of [filing](#) of an appeal with the [Board](#), submit sufficient proof of having posted the required voluntary departure bond. If the [noncitizen](#) does not provide timely proof to the [Board](#) that the required voluntary departure bond has been posted with [DHS](#), the [Board](#) will not reinstate the period of voluntary departure in its final order.

(iii) Upon granting voluntary departure, the [immigration judge](#) shall advise the [noncitizen](#) that if the [noncitizen](#) files a post-order motion to reopen or reconsider during the period allowed for voluntary departure, the grant of voluntary departure shall terminate automatically and the alternate order of removal will take effect immediately.

(iv) The automatic termination of an order of voluntary departure and the effectiveness of the alternative order of removal shall not impact, in any way, the date that the order of the [immigration judge](#) or the [Board](#) became administratively final, as determined under the provisions of the applicable regulations in this chapter.

(v) If, after posting the voluntary departure bond the [noncitizen](#) satisfies the condition of the bond by departing the United States prior to the expiration of the period granted for voluntary departure, the [noncitizen](#) may apply to the ICE Field Office [Director](#) for the bond to be canceled, upon submission of proof of the [noncitizen](#)'s timely departure by such methods as the ICE Field Office [Director](#) may prescribe.

(vi) The voluntary departure bond may be canceled by such methods as the ICE Field Office [Director](#) may prescribe if the [noncitizen](#) is subsequently successful in overturning or remanding the [immigration judge](#)'s decision regarding removability.

## Provisions Relating to Bond

(4) *Provisions relating to bond.* The voluntary departure bond shall be posted with the ICE Field Office [Director](#) within 5 business [days](#) of the [immigration judge](#)'s order granting voluntary departure, and the ICE Field Office [Director](#) may, at the ICE Field Office [Director](#)'s discretion, hold the [noncitizen](#) in custody until the bond is posted. Because the purpose of the voluntary departure bond is to ensure that the [noncitizen](#) does depart from the United States, as promised, the failure to post the bond, when required, within 5 business [days](#) may be considered in evaluating whether the [noncitizen](#) should be detained based on risk of flight, and also may be considered as a negative discretionary factor with respect to any discretionary form of relief. The [noncitizen](#)'s failure to post the required voluntary departure bond within the time required does not terminate the [noncitizen](#)'s obligation to depart within the period allowed or exempt the [noncitizen](#) from the consequences for failure to depart voluntarily during the period allowed. However, if the [noncitizen](#) had waived appeal of the [immigration judge](#)'s decision, the [noncitizen](#)'s failure to post the required voluntary departure bond within the period allowed means that the alternate order of removal takes effect immediately pursuant to [8 CFR 1241.1\(f\)](#), except that a [noncitizen](#) granted the privilege of voluntary departure under [8 CFR 1240.26\(c\)](#) will not be deemed to have departed under an order of removal if the noncitizen:

(i) Departs the United States no later than 25 [days](#) following the failure to post bond;



(ii) Provides to [DHS](#) such evidence of the [noncitizen](#)'s departure as the ICE Field Office [Director](#) may require; and

(iii) Provides evidence [DHS](#) deems sufficient that he or she remains outside of the United States.

## **Alternate Order of Removal**

(d) *Alternate order of removal.* Upon granting a request made for voluntary departure either prior to the completion of proceedings or at the conclusion of proceedings, the [immigration judge](#) shall also enter an alternate order or removal.

## **AMOUNT OF TIME**

(e) *Periods of time.* If voluntary departure is granted prior to the completion of removal proceedings, the [immigration judge](#) may grant a period not to exceed 120 days. If voluntary departure is granted at the conclusion of proceedings, the [immigration judge](#) may grant a period not to exceed 60 days.

If granted **PRIOR TO COMPLETION OF PROCEEDINGS** the Judge may grant a period of up to 120 days.

If granted **AFTER COMPLETION OF PROCEEDINGS** then the Judge cannot grant a period any longer than 60 days.

# Effects of Motion to Reopen/Reconsider or Appeal

**(1) Motion to reopen or reconsider filed during the voluntary departure period.** The [filing](#) of a motion to reopen or reconsider prior to the expiration of the period allowed for voluntary departure has the effect of automatically terminating the grant of voluntary departure, and accordingly does not toll, stay, or extend the period allowed for voluntary departure under this section. See paragraphs (b)(3)(iii) and (c)(3)(ii) of this section. If the [noncitizen](#) files a post-order motion to reopen or reconsider during the period allowed for voluntary departure, the penalties for failure to depart voluntarily under section 240B(d) of the [Act](#) shall not apply. The [Board](#) shall advise the [noncitizen](#) of the condition provided in this paragraph in writing if it reinstates the [immigration judge](#)'s grant of voluntary departure.

**(2) Motion to reopen or reconsider filed after the expiration of the period allowed for voluntary departure.** The [filing](#) of a motion to reopen or a motion to reconsider after the time allowed for voluntary departure has already expired does not in any way impact the period of time allowed for voluntary departure under this section. The granting of a motion to reopen or reconsider that was filed after the penalties under section 240B(d) of the [Act](#) had already taken effect, as a consequence of the [noncitizen](#)'s prior failure voluntarily to depart within the time allowed, does not have the effect of vitiating or vacating those penalties, except as provided in section 240B(d)(2) of the [Act](#).

**(f) Extension of time to depart.** Authority to extend the time within which to depart voluntarily specified initially by an [immigration judge](#) or the [Board](#) is only within the jurisdiction of the district [director](#), the Deputy Executive Associate [Commissioner](#) for Detention and Removal, or the [Director](#) of the

Office of Juvenile Affairs. An [immigration judge](#) or the [Board](#) may reinstate voluntary departure in a removal proceeding that has been reopened for a purpose other than solely making an application for voluntarily departure if reopening was granted prior to the expiration of the original period of voluntary departure. In no event can the total period of time, including any extension, exceed 120 [days](#) or 60 [days](#) as set forth in section 240B of the [Act](#). The [filing](#) of a motion to reopen or reconsider does not toll, stay, or extend the period allowed for voluntary departure. The [filing](#) of a petition for review has the effect of automatically terminating the grant of voluntary departure, and accordingly also does not toll, stay, or extend the period allowed for voluntary departure.

**(g) *Administrative Appeals.*** No appeal shall lie regarding the length of a period of voluntary departure (as distinguished from issues of whether to grant voluntary departure).

**(h) *Reinstatement of voluntary departure.*** An [immigration judge](#) or the [Board](#) may reinstate voluntary departure in a removal proceeding that has been reopened for a purpose other than solely making application for voluntary departure, if reopening was granted prior to the expiration of the original period of voluntary departure. In no event can the total period of time, including any extension, exceed 120 [days](#) or 60 [days](#) as set forth in section 240B of the [Act](#) and [paragraph \(a\)](#) of this section.

**(i) *Effect of filing a petition for review.*** If, prior to departing the United States, the [noncitizen](#) files a petition for review pursuant to section 242 of the [Act](#) ([8 U.S.C. 1252](#)) or any other judicial challenge to the administratively final order, any grant of voluntary departure shall terminate automatically upon the [filing](#) of the petition or other judicial challenge and the alternate order of removal entered pursuant to [paragraph \(d\)](#) of this section shall immediately take effect, except that a [noncitizen](#) granted the privilege of voluntary

departure under [8 CFR 1240.26](#)(c) will not be deemed to have departed under an order of removal if the [noncitizen](#) departs the United States no later than 30 [days](#) following the [filing](#) of a petition for review, provides to [DHS](#) such evidence of the [noncitizen](#)'s departure as the ICE Field Office [Director](#) may require, and provides evidence [DHS](#) deems sufficient that he or she remains outside of the United States. The [Board](#) shall advise the [noncitizen](#) of the condition provided in this paragraph in writing if it reinstates the [immigration judge](#)'s grant of voluntary departure. The automatic termination of a grant of voluntary departure and the effectiveness of the alternative order of removal shall not affect, in any way, the date that the order of the [immigration judge](#) or the [Board](#) became administratively final, as determined under the provisions of the applicable regulations in this chapter. Since the grant of voluntary departure is terminated by the [filing](#) of the petition for review, the [noncitizen](#) will be subject to the alternate order of removal, but the penalties for failure to depart voluntarily under section 240B(d) of the [Act](#) shall not apply to a [noncitizen](#) who files a petition for review, and who remains in the United States while the petition for review is pending.

(j) [Reserved]

## BIA's ABILITY TO GRANT VD

**(k)** *Authority of the Board to grant voluntary departure in the first instance.* The following procedures apply to any request for voluntary departure reviewed by the Board:

**(1)** If the [Board](#) finds that an [immigration judge](#) incorrectly denied a [noncitizen](#)'s request for voluntary departure or failed to provide appropriate advisals, the [Board](#) may consider the [noncitizen](#)'s request for voluntary

departure de novo and, if warranted, may enter its own order of voluntary departure with an alternate order of removal.

(2) In cases in which a [noncitizen](#) has appealed an [immigration judge](#)'s decision or in which [DHS](#) and the [noncitizen](#) have both appealed an [immigration judge](#)'s decision, the [Board](#) shall not grant voluntary departure under section 240B(a) of the [Act](#) unless:

(i) The alien requested voluntary departure under that section before the [immigration judge](#), the [immigration judge](#) denied the request, and the [noncitizen](#) timely appealed;

(ii) The [noncitizen](#)'s notice of appeal specified that the [noncitizen](#) is appealing the [immigration judge](#)'s denial of voluntary departure and identified the specific factual and legal findings that the [noncitizen](#) is challenging;

(iii) The [Board](#) finds that the [immigration judge](#)'s decision was in error; and

(iv) The [Board](#) finds that the [noncitizen](#) meets all applicable statutory and regulatory criteria for voluntary departure under that section.

(3) In cases in which [DHS](#) has appealed an [immigration judge](#)'s decision, the [Board](#) shall not grant voluntary departure under section 240B(b) of the [Act](#) unless:

(i) The alien requested voluntary departure under that section before the [immigration judge](#) and provided evidence or a proffer of evidence in support of the [noncitizen](#)'s request;

(ii) The [immigration judge](#) either granted the request or did not rule on it; and,

(iii) The **Board** finds that the **noncitizen** meets all applicable statutory and regulatory criteria for voluntary departure under that section.

(4) The **Board** may impose such conditions as it deems necessary to ensure the **noncitizen**'s timely departure from the United States, if supported by the record on appeal and within the scope of the **Board**'s authority on appeal. Unless otherwise indicated in this section, the **Board** shall advise the **noncitizen** in writing of the conditions set by the **Board**, consistent with the conditions set forth in paragraphs (b) through (e), (h), and (i) of this section (other than **paragraph (c)(3)(ii)** of this section), except that the **Board** shall advise the **noncitizen** of the duty to post the bond with the ICE Field Office **Director** within 30 business **days** of the **Board**'s order granting voluntary departure. If documentation sufficient to assure lawful entry into the country to which the **noncitizen** is departing is not contained in the record, but the **noncitizen** continues to assert a request for voluntary departure under section 240B of the **Act** and the **Board** finds that the **noncitizen** is otherwise eligible for voluntary departure under the **Act**, the **Board** may grant voluntary departure for a period not to exceed 120 **days**, subject to the condition that the **noncitizen** within 60 **days** must secure such documentation and present it to **DHS** and the **Board**. If the **Board** imposes conditions beyond those specifically enumerated, the **Board** shall advise the **noncitizen** in writing of such conditions. The **noncitizen** may accept or decline the grant of voluntary departure and may manifest a declination either by written notice to the **Board**, by failing to timely post any required bond, or by otherwise failing to comply with the **Board**'s order. The grant of voluntary departure shall automatically terminate upon a **filing** by the **noncitizen** of a motion to reopen or reconsider the **Board**'s decision, or by **filing** a timely petition for review of the **Board**'s decision. The **noncitizen** may decline voluntary departure when unwilling to accept the amount of the bond or other conditions.

a rebuttable presumption that the civil penalty for failure to depart, pursuant to section 240B(d)(1)(A) of the [Act](#), shall be set at \$3,000

# Penalty for Failure to Depart After Taking Voluntary Departure

(I) *Penalty for failure to depart.* There shall be a rebuttable presumption that the civil penalty for failure to depart, pursuant to section 240B(d)(1)(A) of the [Act](#), shall be set at \$3,000 unless the [immigration judge](#) or the [Board](#) specifically orders a higher or lower amount at the time of granting voluntary departure within the permissible range allowed by law. The [immigration judge](#) or the [Board](#) shall advise the [noncitizen](#) of the amount of this civil penalty at the time of granting voluntary departure.

[[62 FR 10367](#), Mar. 6, 1997, as amended at [67 FR 39258](#), June 7, 2002; [73 FR 76937](#), Dec. 18, 2008; [85 FR 81655](#), Dec. 16, 2020; [86 FR 70724](#), Dec. 13, 2021; [89 FR 46795](#), May 29, 2024]

## Consequences of Not Departing After VD

Any respondent who is granted voluntary departure is subject to civil penalties if he or she “fails voluntarily to depart the United States within the time period specified....” See INA § 240B(d). The respondent may be subject to a monetary fine of up to \$5,000 and will be barred for ten years from

being granted cancellation of removal, adjustment of status, change of status, registry, and voluntary departure. *See* INA § 240B(d).

There is a rebuttable presumption that the penalty for failure to depart shall be set at \$3,000 under 8 C.F.R. § 1240.26(j).

## **8 CFR 240**

### **Subpart C—Voluntary Departure**

#### **§ 240.25 Voluntary departure—authority of the Service.**

**(a) *Authorized officers.*** The authority contained in section 240B(a) of the Act to permit aliens to depart voluntarily from the United States may be exercised in lieu of being subject to proceedings under section 240 of the Act by district directors, assistant district directors for investigations, assistant district directors for examinations, officers in charge, chief patrol agents, the Deputy Executive Associate Director for Enforcement and Removal Operations, the Director of the Office of Juvenile Affairs, service center directors, and assistant service center directors for examinations.

**(b) *Conditions.*** The Service may attach to the granting of voluntary departure any conditions it deems necessary to ensure the alien's timely departure from the United States, including the posting of a bond, continued detention pending departure, and removal under safeguards. The alien shall be required to present to the Service, for inspection and photocopying, his or her passport or other travel documentation sufficient to assure lawful entry



into the country to which the alien is departing. The Service may hold the passport or documentation for sufficient time to investigate its authenticity. A voluntary departure order permitting an alien to depart voluntarily shall inform the alien of the penalties under section 240B(d) of the Act.

**(c) *Decision.*** The authorized officer, in his or her discretion, shall specify the period of time permitted for voluntary departure, and may grant extensions thereof, except that the total period allowed, including any extensions, shall not exceed 120 days. Every decision regarding voluntary departure shall be communicated in writing on Form I-210, Notice of Action—Voluntary Departure. Voluntary departure may not be granted unless the alien requests such voluntary departure and agrees to its terms and conditions.

**(d) *Application.*** Any alien who believes himself or herself to be eligible for voluntary departure under this section may apply therefor at any office of the Service. After the commencement of removal proceedings, the application may be communicated through the Service counsel. If the Service agrees to voluntary departure after proceedings have commenced, it may either:

(1) Join in a motion to terminate the proceedings, and if the proceedings are terminated, grant voluntary departure; or

(2) Join in a motion asking the immigration judge to permit voluntary departure in accordance with [§ 240.26](#).

**(e) *Appeals.*** An appeal shall not lie from a denial of an application for voluntary departure under this section, but the denial shall be without prejudice to the alien's right to apply to the immigration judge for voluntary departure in accordance with [§ 240.26](#) or for relief from removal under any provision of law.

**(f) *Revocation.* If, subsequent to the granting of an application for voluntary departure under this section, it is ascertained that the application should not have been granted, that grant may be revoked without advance notice by any officer authorized to grant voluntary departure under [§ 240.25\(a\)](#). Such revocation shall be communicated in writing, citing the statutory basis for revocation. No appeal shall lie from revocation.**

## **Can the Departure Period be Extended?**

**Only DHS has jurisdiction to extend a final order of voluntary departure. A request to extend the departure period should be addressed to the District Director, the Deputy Executive Associate Commissioner for Detention and Removal, or the Director of the Office of Juvenile Affairs and may extend the period up to “120 days or 60 days as set forth in section 240B of the Act.”**

**See 8 C.F.R. § 1240.57.**

**If a respondent is given 120 days then there is no way to extend it any further.**

## **Proof of Posting Bond on Appeal**

**See *Matter of A-M-*, 23 I&N Dec. at 744. Pursuant to voluntary departure rules that went into effect on January 20, 2009, **a voluntary departure applicant is required to provide the BIA with proof of having posted the voluntary departure bond within 30 days of filing the notice of appeal.** See 8 C.F.R. § 1240.26(c)(3)(ii). If the person does not provide proof, the BIA will not**

**reinstate the voluntary departure order following an unsuccessful appeal. See *Matter of Velasco*, 25 I&N Dec. 143 (BIA 2009) (holding that the requirement in 8 C.F.R. § 1240.26(c)(3)(ii) applies to all voluntary departure orders entered after January 20, 2009). Individuals who decide that they do not want voluntary departure should not provide proof of payment, thus indicating their intent to withdraw their request for voluntary departure.**

**Failure to Post Bond Within Five Business Days.** If an individual fails to post the required voluntary departure bond within five business days, an alternate order of removal goes into effect. For respondents who waived appeal, failure to post the bond within five days automatically triggers the alternate order of removal, as well as the consequences of failure to depart. However, respondents who fail to post the voluntary departure bond within five days may still avoid these consequences if they (1) depart within twenty-five days of the failure to post bond (2) provide evidence to DHS that they departed within the appropriate time, and (3) provide evidence that they remain outside of the United States.

## **Involuntary Failure to Depart**

**Prior to the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), the consequences of failing to depart did not apply to any respondent whose failure to depart was because of “exceptional circumstances.” This language was removed in IIRIRA and replaced with the language in INA § 240B(d) that attached penalties where a respondent “voluntarily fails to depart.” In *Matter of Zmijewska*, 24 I&N Dec. 87 (BIA 2007), the BIA first interpreted this new language, and found that it created a new “voluntariness” exception.**

**Where a respondent “through no fault of his or her own, is unaware of the voluntary departure order or is physically unable to depart” the consequences do not apply. The BIA “emphasize[d] that the ‘voluntariness’ exception is not a substitute for the repealed ‘exceptional circumstances’ exception” but a “much narrower” one.**

**However, in other cases, where the BIA has determined a level of responsibility lies with respondent for failing to depart, the BIA has denied access to the “voluntariness” exception. Thus, even where a respondent failed to depart because he was indicted during the voluntary departure period and was ordered not to depart the country, his failure to depart was deemed “voluntary” because “his inability to timely depart stemmed from his own criminal conduct....” Similarly, the BIA found a failure to depart “voluntary” where a SIJS-eligible respondent failed to depart because his father told him “not to depart because the respondent's mother abandoned him in Guatemala and he was the respondent's sole support.”**

**For respondents citing ineffective assistance of counsel to support a claim that the failure to depart was involuntary, the BIA has required that respondents adhere to the requirements for claiming ineffective assistance of counsel laid out in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1998)**

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# **Reinstatement of Removal**

## **Reinstatement of Removal**

**If an alien is found to have reentered the United States illegally after having been previously removed or having left under a grant of voluntary departure under a removal order, the alien may be subject to reinstatement of removal. Reinstatement of removal is a procedure where the Department of Homeland Security (DHS) reviews the previous removal order, and in its discretion, reinstates that prior removal order. Aliens ultimately subject to reinstatement of removal will not have the opportunity to have the reinstatement reviewed by an immigration judge. Where DHS is considering reinstatement of removal, an alien, depending on the facts of his or her situation, may have limited avenues to seek relief from reinstatement of removal.**

## **Rules and Regulations for Reinstatement of Removal**

**Section 241(a)(5) of the Immigration and Nationality Act (INA) provides only that where the Attorney General finds that an alien has committed an illegal**

reentry into the United States after having previously been removed or been granted and left pursuant to a grant of voluntary departure, the prior order of removal shall be reinstated and is not subject to reopening or review. The statute continues to add that the alien may not apply for any form of relief, and shall be removed pursuant to the reinstated removal order.

Regulations found in 8 C.F.R. 241.8 list the three factors that the immigration officer should ascertain in order to establish whether an alien should be subject to reinstatement of removal:

- 1. Whether the alien has been subject to a prior order of removal;*
- 2. Verification of the alien's identity to confirm whether the alien in question is the alien was subject to a prior order of removal;*
- 3. Whether the alien entered the United States unlawfully.*

# Withholding Only Proceedings

An alien subject to reinstatement of removal may seek withholding of removal and a claim based upon the Convention Against Torture (CAT) by attempting to demonstrate that he or she would face a high likelihood of torture upon removal. The alien may attest to having a fear of persecution if he or she is returned to home country. In this scenario, the alien will be granted a credible fear interview with an asylum officer. See 8 C.F.R. §§ 208.31, 241.8(d).

If the asylum officer determines that the alien does not have a credible fear of persecution or torture, the alien may obtain review from an immigration

judge. However, it is important to note that asylum may be barred if the alien is subject to a mandatory bar to applying or being granted asylum. The alien may lodge a constitutional or legal challenge against the original removal proceeding.

## Case Law

*Delgado v. Mukasey*, **516 F.3d 65, 67 (2d Cir. 2008)**

*Ponta-Garcia v. Att'y Gen. of the U.S.*, **557 F.3d 158, 161-64 (3d Cir. 2009)**

*Herrera-Molina v. Holder*, **597 F.3d 128, 138-40 (2d Cir. 2010)**

*Debato v. Att'y Gen. of the U.S.*, **505 F.3d 231 (3d Cir. 2007)**